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TABLE OF CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 172.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY,

APPELLANTS,

vs.

ALRA G. FARRELL,

APPELLEE.

BRIEF FOR APPELLANTS.

PRELIMINARY STATEMENT.

Insofar as it involves the question (and the sole question) considered and decided by the Circuit Court of Appeals, this case is practically identical with *West v. Edward Rutledge Timber Co.*, 244 U. S. 90. Both cases involve a selection of unsurveyed land by the Northern Pa-

cific Railway Company under the exchange provisions of the act of March 2, 1899 (30 Stat. 993), and the question is as to the sufficiency of the description of the selected land contained in the Railway Company's selection list; which described the land selected as the "tract *which when surveyed will be described* as Section 20" of the designated township and range.

In both cases it was argued that a description in these terms, of land not yet surveyed, was insufficient under that clause of the act of 1899 which provides that "if the selected land be unsurveyed" the selection list "shall describe such tract in such manner as to designate the same with a reasonable degree of certainty." The land involved in the two cases is in adjoining townships; the physical characteristics of the country are the same. The two selection lists were identical in form and substance. In the West case the description was held good by the concurring decisions of the District Court, the Court of Appeals and this Court. Yet in the case at bar the Court of Appeals, in the teeth of its own decision and the decision of this Court in the West case, and by a process of reasoning we find it hard to follow, held the description insufficient and reversed the decree of the District Court upholding the Railway Company's selection. Hence this appeal.

This question of the sufficiency of the form of description used in the Railway Company's selection list was the sole question considered by the Court of Appeals. And its decision went on exceedingly narrow lines. It undertook to distinguish the West case on the ground (and the sole ground) that in the West case the land selected was but 3¼ miles from the nearest surveyed line then established, while in the case at bar the land was 7½ miles from the

nearest established line. Upon this difference in distance alone (no other ground of distinction being suggested—or possible) the Court of Appeals arrived at a conclusion flatly opposed to its own decision and that of this Court in the West case, as well as the decision of the District Court in the case at bar.

In the West case the District Court and the Court of Appeals held that the question whether a description in terms of future survey is sufficiently definite and certain to satisfy the requirements of the act of 1899, is a question of *fact*, or of mixed law and fact, upon which the decision of the Department of the Interior is conclusive; and that reasoning was accepted by this court as sufficient to dispose of the case. In the case at bar the Court of Appeals, while conceding that the sufficiency of such a description is a question of fact, sought to avoid the well-known rule that the decision of the Interior Department on a question of fact is conclusive (in the absence of fraud or mistake) and cannot be re-examined in the courts, by saying that the record in this case does not disclose that the Department considered the sufficiency of this description *as a question of fact*, but rather that it upheld the selection by the application of a general rule of law. In this, as we shall show, the Court of Appeals fell into manifest and flagrant error with respect to the state of the record in this case, as well as with respect to the principles of law controlling cases of this character.

STATEMENT OF THE FACTS.

As pointed out in the decision of this court in the West case (244 U. S. 90), the Act of March 2, 1899 (30 Stat. 993) was passed in furtherance of a design of the Government to obtain title to certain lands in the Mt. Ranier National Park then owned by the defendant Railway Company in fee—most of which were still unsurveyed. Accordingly Section 3 of that act provides that upon filing a proper deed of relinquishment "said company is hereby authorized to select an equal quantity of non-mineral public lands • • • lying within any state through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished." Section 4 of the act is as follows:

> "That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. *In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty;* and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company

shall be permitted to describe such tract anew, so as to secure such conformity."

By regulations originally adopted by the Interior Department in the administration of similar lieu selection acts previously enacted, permitting the selection of unsurveyed lands, which regulations were by the Department made applicable to selections under the act of 1899, it was provided:

> "Every selection of unsurveyed lands *must designate the same by the description by which it will be known when surveyed, if that be practicable*; or if not practicable, must give with as much precision as possible the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of public survey come to be extended."
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> Daniels v. Northern Pacific, 43 L. D. 381.
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> Hannon v. Northern Pacific, 38 L. D. 491.
>
> West v. Edward Rutledge Timber Co., (C. C. A.) 221 Fed. 30, 33.

On July 23, 1901, the Railway Company duly filed in the local land office at Coeur d'Alene, Idaho, its selection list No. 71, whereby it selected certain unsurveyed lands, describing them as "*tracts of land which, when surveyed, will be described as follows:*" There follows a description, by section, township and range, of the tracts selected; among them being Section 20 in township 43 North, range 4 east, of which the land here in controversy—the northeast quarter of said Section 20—is a part. (Transcript, pp. 102-107.) This selection list was in all respects identical in form and substance (save only as to the particular lands described) with the list under consideration

in the West case. See pages 49-54 of the Transcript in the West case. And it will be seen that it is in exact compliance with the rule prescribed by the Department itself. The selection list so filed was, like the list in the West case, accepted and approved by the Register and Receiver. (Tr. 106-107.)

Two years after this selection was made—that is, in June or July, 1903—Belden M. Delany, to whose interest plaintiff succeeded, settled on the land in controversy, and resided thereon at intervals up to the time of his death. The township was still unsurveyed, but the south line of Township 45, Range 4, and the east line of Township 43, Range 2, had previously been surveyed. The nearest of these lines was 7½ miles from the tract in question; the other slightly further. (Tr. 58, 67, 169.)

June 4, 1909, the approved township plat of survey was filed in the local land office at Coeur d'Alene. On the same day the Railway Company duly filed its "re-descriptive list," describing the selected lands anew according to the survey, in compliance with the provisions of Section 4 of the act of 1899, and the regulations and practice of the Interior Department. (Tr. 108-111.) The regularity and sufficiency of this redescriptive list stands unquestioned.

June 10, 1909, a few days after the filing of the township plat of survey and the Railway Company's "re-descriptive list," Delany tendered an application to enter the land under the homestead law, alleging settlement on July 2, 1903. (Tr. 126.) This application was rejected by the Register and Receiver and, on successive appeals, by the Commissioner of the General Land Office and the Secretary of the Interior. Petitions thereafter filed by Delany, for a re-hearing and for the exercise of the super-

visory power of the Secretary, were denied by the Secretary. (Tr. 126, 118-123.)

Finally, the Railway Company's selection having previously been approved by the Secretary, a patent for the land in suit was duly issued to the Railway Company on June 6, 1916. (Tr. 127-130.) And on July 17, 1916, the Railway Company conveyed the land to the defendant Timber Company in fulfillment of previous contract. (Tr. 16, 34, 53-54.)

Shortly after the issuance of patent and the conveyance to the Timber Company, Delany commenced this suit in equity in the District Court, naming the Railway Company and the Timber Company as defendants—as in the West case. And as in that case, the theory of the complaint was that the defendants were chargeable as trustees of the patent title, on the ground that the Department of the Interior committed an error of law in holding the Railway Company's selection valid and awarding it patent for the land.

Delany died before the suit was brought to trial, and the present plaintiff Farrell (for convenience we refer to the parties as "plaintiff" and "defendants," as in the District Court), who had succeeded to Delany's interest as an heir and by conveyance from other heirs, was substituted as plaintiff.

It is to be borne in mind that Delany did not initiate his settlement claim until two years *after* the land had been selected by the Railway Company. No question of priority is involved. It is true that the bill of complaint alleges that Leach, a former settler whose cabin and improvements were taken over by Delany, first went on the land in April, 1901. (Tr. 9.) But at the trial this alle-

gation was withdrawn, and it was admitted that Leach did not go on the land until 1902, a year after its selection by the Railway Company; thus removing from the case a question which was made a rather prominent feature of the pleadings. (Tr. 57-58.)

The Railway selection was attacked on two grounds: First because of the supposed insufficiency of a description in terms of future survey; and second, upon the theory that an attempted application for survey under the act of August 18, 1894, made by the Governor of Idaho a few days before the Railway Company's selection list was filed, operated as a "withdrawal" or "reservation" of the land, so that it was not subject to selection under the Act of March 2, 1899. We believe it will serve better, as being less likely to create confusion, to defer the detailed statement of the facts involved in this latter point until we come to the discussion of that question later in this brief; since the point was not considered or passed upon in any way by the Court of Appeals.

The District Court (Judge Dietrich) sustained the Railway selection against both grounds of attack—holding the description in the selection list sufficient under its own reasoning and that of the Court of Appeals and this Court in the West case—and entered a decree dismissing the bill. (Tr. 136-146.) Thereupon plaintiff took the case to the Court of Appeals. That Court, as we have indicated, held the description insufficient and reversed the decree—upon the theory already alluded to—without passing upon the question involving the State's application for survey. (Tr. 157-160.)

In the statement prefixed to its opinion (Tr. 157-158) the Court of Appeals says: "The facts *as found by the court below* are, etc." This is quite misleading. The recital of facts which follows it is *not* taken from the findings of the trial court. (Tr. 136-146.) It seems to have been taken, almost literally (although with some condensations and omissions), from the brief filed in that court by counsel for the present appellee; and it incorporates some of the inaccuracies and misstatements of that brief. Comparatively few of the recitals are really of "facts as found by the court below." Some of the recitals are rather hard to reconcile with the findings, if not actually in conflict. And some are quite without support in either findings or evidence. For illustration, compare the recitals regarding the acts of settlement, residence, cultivation, etc., by Delaney and his predecessor, Leach, which the opinion of the Court of Appeals sets forth as "facts found by the court below," with what the trial court actually said on that subject (Tr. 137-138). Or search the record (it will be searched in vain) for a finding that when Leach and Delaney made their respective settlements either was without knowledge or notice that the land had previously been selected by the Railway Company—or for evidence which could lend any support for such a finding, if it had been made. Or, on the very important point of the language in which the land is described in the selection list, contrast the somewhat misleading recital of the opinion (Tr. 158) with the terms of the selection list itself (Tr. 104.)

These inaccuracies may be of no great importance—in our view of the case they are, of course, immaterial. But taken together they give the case a color and twist which tends to convey a false impression—especially as to what

counsel called the "equities" of the claimant Delaney. And some such sort of an impression seems to have influenced the Court of Appeals itself. (Tr. 160.)

It must go without saying that we do not for a moment doubt the complete sincerity and good faith of the eminent judges who participated in this opinion. But we think the opinion evinces an unfortunate looseness of grasp of the facts and the record. Nothing less could explain the court's extraordinary error respecting the issues decided by the Land Department, which error is the very foundation of the decision appealed from.

SPECIFICATION OF ERRORS.

1. The Court erred in holding that W. B. Leach, the first alleged settler on the land in controversy, had no knowledge at the time of his alleged settlement upon the land of the filing by the Northern Pacific Railway Company of the lieu selection list referred to in the Court's opinion.

2. The Court erred in holding that Belden M. Delany, who afterwards settled on said land, did not know at the time of his settlement thereon of the filing of said selection list by said Northern Pacific Railway Company, and did not know that an attempt had been made to appropriate the land, either by the State of Idaho or by the Northern Pacific Railway Company.

3. The Court erred in holding that said Delany continuously made his home on the land in controversy after his settlement thereon, and that he improved and cultivated said land and resided thereon to an extent sufficient to constitute compliance with the conditions of the homestead law.

4. The Court erred in holding that by his letter to said Delany dated December 16, 1919, the Commissioner of the General Land Office sustained the decision of the local land officers rejecting said Delany's application on the ground that the State of Idaho had acquired a prior right to the land and ruled that said application was properly rejected on that ground.

5. The Court erred in holding that the Secretary of the Interior and the officials of the Department of the In-

terior did not determine and decide as a question of fact that the description of the land in controversy contained in the said selection list of said Northern Pacific Railway Company designated the land selected with a reasonable degree of certainty, and in holding that the decisions of the Secretary of the Interior rejecting said Delany's application do not state or show that such rejection was supported by the facts.

6. The Court erred in holding that the Secretary of the Interior and the officials of the Interior Department, in passing on the case, did not take into consideration the particular circumstances attending the selection of said land by the Northern Pacific Railway Company, and in holding that said Secretary of the Interior and said Department officials did not decide that the description of said land in its selection list was reasonably sufficient, as applied to the particular tract of land involved in this suit.

7. The Court erred in holding that the description of the land selected by the Northern Pacific Railway Company contained in its said selection list (including the land in controversy in this suit) was not sufficient to designate said land with a reasonable degree of certainty, within the intent and meaning of the act of March 2, 1899.

8. The Court erred in holding that the Northern Pacific Railway Company did not acquire full and complete title, legal and equitable, to the land in controversy, under the patent of the United States issued to it.

9. The Court erred in reversing the decree of the District Court dismissing the bill of complaint herein, and in making and entering a decree in favor of the appellant Farrell.

ARGUMENT.

I.

It is a familiar and well settled rule of law that where, in passing upon a claim to a tract of public land, either as between conflicting claimants or as a preliminary to the issué of patent, the Department is called upon to determine a question of *fact*, or of *mixed law and fact*, its determination is final and conclusive and not subject to re-examination by the courts.

Marquez v. Frisbie, 101 U. S. 473, 475.
Ross v. Day, 232 U. S. 110, 116.
Whitcomb v. White, 214 U. S. 15.
Ross v. Stewart, 227 U. S. 530, 535.
Shepley v. Cowan, 91 U. S. 330, 340.
Vance v. Burbank, 101 U. S. 514, 519.

Now it is manifest that the question whether the form of description used in the Railway Company's selection list was sufficient to "designate the land with a reasonable degree of certainty" within the intent of the Act of 1899, is essentially a question of fact—or, at most, a question of mixed law and fact. This would be true in any case, but it is peculiarly and strikingly so in the present instance. For the ground upon which the selection is attacked, and upon which the Court of Appeals held the description insufficient, is based entirely upon physical conditions peculiar to this particular tract of land—matters *in pais* and not of record. Conceding that the description would have been good if the land had been no more than 3½ miles distant from the nearest surveyed line, as in the West case; the Court of Appeals held the description bad

because the land was 7½ miles distant from surveyed line. Further, it is implied that this distance would not be objectionable in a level or open country, but is so great as to be fatal to the certainty of the description, because the country is rough, broken and heavily timbered (which, by the way, was equally true in the West case). The theory held by the Court of Appeals seems to be that the sufficiency of description must be determined anew in each particular case, with reference to the conditions peculiar to that case. And it is apparent that the question whether the description identifies the land with a requisite degree of certainty is made to turn wholly upon consideration of physical conditions peculiar to the given tract. Can one conceive of an issue which more plainly involves nothing but questions of fact?

This court said in Burfenning v. Chicago, etc., Ry. Co., 163 U. S. 321, 323:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. Johnson v. Towsley, 13 Wall. 72; Smelting Company v. Kemp, 104 U. S. 636; Steel v. Smelting Company, 106 U. S. 447; Wright v. Rose-

berry, 121 U. S. 488; Heath v. Wallace, 138 U. S. 573; McCormick v. Hayes, 159 U. S. 332."

In the West case (221 Fed. 30, 32) the Court of Appeals said:

> "To prevail, the plaintiff must sustain the position that the description contained in the Railway Company's selection list first filed was, as matter of law, insufficient to support the selection, for if it depended on a matter of fact the controversy would have been settled by the judgment of the Land Department in rejecting the application of West for homestead entry and approving the selection of the Railway Company (citing and quoting from Burfenning v. Chicago, etc., supra.)"

By the concurring decisions of the Court of Appeals and this Court in the West case (244 U. S. 90, 99) it is definitely settled that the sufficiency and certainty of the description in the Railway Company's selection list is not open to question as matter of law. And upon the question of fact, the judgment of the Land Department is final and conclusive, under the authorities cited.

2.

But in the case at bar the Court of Appeals took a brand new position. And in the effort to square this position with its own decision and that of this court in the West case, and with the rule of law just referred to, it evolved a most extraordinary theory respecting the action of the Department—so extraordinary that it must be stated in the language of the court itself. Nothing else could do it justice. The Court says:

"The appellees contend (1) that the lands were designated with a reasonable degree of certainty, and (2) that the acceptance of the list and the issuance of patent by the Land Office involved the finding of fact that the lands were designated with a reasonable degree of certainty, and that such a finding of fact is conclusive. *We find in this case no decision of fact that the description of the land as listed by the Railway Company designated the same with a reasonable degree of certainty. The record shows on the contrary that no decision was made on the facts of the case*, and that the action of the Land Office was but the application of a settled rule of practice which it followed in all cases, that all unsurveyed lands listed by a Railway Company as lieu lands are to be designated with a reasonable degree of certainty if they are designated by a description applicable to them after they shall have been surveyed. Thus, on the appeal the decision of the Secretary of the Interior states not that the rejection of Delany's application was supported by the facts, but that it was supported by the reasons given by the Department in its decision in *Daniels v. Northern Pacific*, 43 L. D. 381. Turning to that decision we find it stating that all lists filed for lieu lands by railway companies were accepted under general regulations of the Department in every case where the lands were described in the terms of future survey, and the decision points to the Act of Congress of July 1, 1898, which provided that lands under that Act be selected in terms of a future survey, as sanctioning the propriety of the settled practice of the Land Department. • • • In the present case it is clear that the particular circumstances attending this lieu land selection were not taken into consideration by the Land Department. They did not decide that the description was reasonably sufficient, as applied to this particular tract of

land. They applied only a rule of practice and in so doing decided a question of law and not a question of fact." (Tr. 158-159.)

And thus reasoning that it was free to consider the question *de novo*, unhampered by any previous determination by the Land Department, the Court of Appeals argued to the conclusion that inasmuch as the selected land was 7½ miles from an established survey line, and the intervening country was rough and broken, it would be difficult to tie the description back to the existing surveys; and, *therefore* that the description was insufficient to identify the land.

But the trouble with the reasoning quoted from the Court's opinion is that it is flagrantly in the teeth of the facts in the record. Let us see. The keystone of the Court's theory is in the statement: "Thus, on the appeal, the decision of the Secretary of the Interior states not that the rejection of Delaney's application was supported by the facts, but that it was supported by the reasons given by the Department in its decision in *Daniels v. Northern Pacific.*" This refers (as the context shows) to the Secretary's decision of November 18, 1915, on Delaney's original appeal from the General Land Office. Even as to that decision we submit that a little attentive consideration of the record will demonstrate that there is no support for the interpretation given it by the Court of Appeals (Tr. 119-121). But it is easier to pass that point without discussion. For it is manifest that the Court of Appeals wholly overlooked the proceedings which took place in the Department after the decision of November 18, 1915, was promulgated.

First, Delaney filed a motion for rehearing, which was denied by the Secretary January 29, 1916. (Tr. 121-122.) In that motion, and in the brief which accompanied it (both of which are part of the record of the case in the Land Department), Delaney specifically urged the very grounds of objection to the description in the railway selection list which were relied upon in the courts below, and upon the strength of which, alone, the Court of Appeals held the description insufficient and the selection bad; viz.: the supposed difference from the facts and conditions of the West case, the greater distance from the nearest established line of survey, the rough, mountainous and timbered character of the intervening country, and the practical difficulty of identifying the land by this description. In denying the motion Assistant Secretary Jones said: "The questions raised in the motion for rehearing *were all considered by the Department*, and disposed of in the decision complained of." (This was the decision of November 18, 1915.)

Next Delaney filed a petition for the exercise of the supervisory power of the Secretary, and in this petition and the accompanying brief the same objections were urged, with even greater elaboration. The petition was denied March 11, 1916, in an opinion by Assistant Secretary Jones (Tr. 122-125) in which it is said:

> "The act of March 2, 1899, authorized the railroad company to make selections of unsurveyed public lands. Section 4 requires that in case the tract selected should at the time of the selection be unsurveyed the list filed by the company in the local land office should describe the tract 'in such manner as to designate the same with a reasonable degree of cer-

tainty,' and requires a new list to be filed redescribing the land after the survey has been made. The description employed in this particular selection, under the decision in *Daniels v. Northern Pacific Railway Company, supra*, complied with the statute, *as it was made with a reasonable degree of certainty.* The petitioner's contention as to this feature of the case is accordingly not well founded." (Tr. p. 124.)

We do not know how far this court judicially notices the records of the Land Department, where such a reference is necessary to clear up an apparent ambiguity in a decision of the Department which the court is required to consider. But we assume that it is permissible to refer to such records in circumstances like those of the present case and for the purposes for which this reference is made. However, this is really unimportant. Assuming that the Land Department records cannot be resorted to in aid or explanation of these decisions, the language of these decisions themselves is sufficient to refute the error of the Court of Appeals. This is especially true of the decision of March 11, 1916, on Delaney's petition for the exercise of the supervisory power, where the Secretary said: "The description employed in this particular selection • • • complied with the statute, as it was made with a reasonable degree of certainty."

3.

But suppose it were true (and it is not) that the record in this case failed to show affirmatively that the Department had considered and passed upon the sufficiency of the description as a question of fact. Nevertheless it is clear that there is nothing in the record to furnish the slightest support for the claim that it did *not* do so—nothing to support the inference that it failed to take into consideration all the factors of location and physical and geographical conditions. The most that could possibly be said is that there is a lack of *affirmative* showing that these questions were considered and decided; although it sufficiently appears that they were before the Department and that their consideration was necessary to a proper disposition of the case. And under well-settled rules it must be presumed that in deciding the case and awarding patent to the Railway Company the Department, in the performance of its plain duty, considered and decided all questions essential to the determination of the rights of the contesting parties and the right of the Railway Company to patent.

Some of the well-known rules, established by the decisions of this Court, are here brought into play. A patent for land is not only a conveyance; it is also the judgment of a quasi-judicial tribunal to which questions relating to the disposition of the public lands are confided, that the patentee is entitled to the land. It is impervious to collateral attack or by action at law and may only be attacked by direct suit in equity. In such a suit, the patent is conclusive upon all questions of fact or mixed law and

fact actually decided by the Department, or necessarily involved or implied in the determination that the patentee is entitled to the land. No inferences or presumptions will be indulged adverse to the patent title. The patent imports an adjudication by the Department of the existence of every fact necessary to entitle the patentee to the land; and this adjudication cannot be overthrown by inference, presumption or evidence susceptible to differing constructions. The burden is always upon the party attacking the patent title. And where there is any conflict or uncertainty in the showing, or where conflicting inferences may be drawn from the evidence, although undisputed, the burden is not sustained, and the patent will control.

Smelting Co. v. Kemp, 104 U. S. 646.

Lee v. Johnson, 116 U. S. 48.

Maxwell Land Grant Case, 121 U. S. 325, 379, 381.

Quinby v. Conlan, 104 U. S. 426.

Marquez v. Frisbie, 101 U. S. 473, 475.

Ross v. Stewart, 227 U. S. 530, 535.

Ross v. Day, 232 U. S. 110, 116.

Leonard v. Lennox (C. C. A. 8th Cir.), 181 Fed. 760, 762.

United States v. Beaman (C. C. A. 8th Cir.), 242 Fed. 876, 879.

Conkling Mining Co. v. Silver King, etc., Co. (C. C. A. 8th Cir.), 230 Fed. 553, 558.

In the case last cited the Court said:

"A patent of land within the jurisdiction of the Land Department of the United States, and this land was within its jurisdiction, is the judgment of that tribunal upon the evidence before it that the patentee

is entitled to the land therein described and the conveyance of the legal title to the land to the patentee in execution of the judgment. The Land Department is a special tribunal vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and its judgment, evidenced by its patent, is conclusive of the right of the claimant and of the United States to such land and of every issue which it was necessary for the Land Department to decide in determining those rights. The validity, the extent and the boundaries of the claim in this case, and in every case, are unavoidable issues which it must adjudge in sustaining any part or all of the claim in hand, or any other claim of this character. * * *"

4.

We have discussed the case thus far under the implied concession that the Department might properly consider the sufficiency of description in each selection list, as a question independent of the general rules and regulations previously prescribed by it. But this is far from our real view.

In the Act of 1899 Congress merely provided that where unsurveyed land was selected the selection list should describe the land "so as to designate the same with a reasonable degree of certainty," and left it to the Land Department to determine and prescribe what form of description would meet this requirement. In discharge of the duty thus imposed upon them, the officers of the Land Department determined that a description in terms of future sur-

vey was not only sufficiently definite and certain to comply with the terms of the act, but was the best, most convenient and most practical form of description. For in the regulations to which reference has already been made, the Land Department not only *permitted* this form of description, but made it mandatory and exclusive—save in exceptional cases with which we are not here concerned.

In the disposal of the public lands, Congress must necessarily leave to the administrative officers of the Land Department the decision of many important questions which arise in the administration of the laws enacted by Congress. It is not feasible, nor wise, for Congress, by legislative enactment, to prescribe in precise detail every step or formality which shall be observed by those seeking to acquire the public land. So in the act of 1899 it was left to the Department to determine what forms of description would, from time to time under actual existing conditions, best satisfy the requirement of "reasonable certainty."

And there was a special propriety in committing this question to the administrative discretion of the Land Department. Considering the nature and character of its duties, its knowledge, and its daily experience in the administration of this and similar acts, the Department would be supposed to know better than anyone what form of description would best serve the purpose of the law, and would in the best and most practical way satisfy the requirement of certainty.

Now it seems to us obvious that when the Department came to consider and determine this question, and when in so doing it permitted and prescribed the form of description used by the Railway Company in this case, it considered and decided a question of fact—or, if you will,

of mixed law and fact. And when the Railway Company has proceeded in accordance with the directions thus prescribed by the Department, and in the only manner permitted by those directions, and its selection has been approved by the Secretary and patent issued to it, its title is not open to attack on the ground that the Department might better have prescribed a different form of description.

In *Groeck v. Southern Pacific Railway Co.* (C. C. A.), 102 Fed. 32, 34, the Court said:

> "Considering the language of the grant, it must be held that indemnity lands are selected under the direction of the Secretary of the Interior whenever the grantee thereof complies with the directions which the Secretary has published for the regulation of such selection. The Secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed. Nor has the Secretary in this instance made any regulation which has injuriously affected the right of the grantee. He had the power to prescribe in advance the method of making such selection, and, having prescribed it, and his directions having been followed, it cannot be said that the lands were not selected in the manner required by the granting act."

5.

A determination that the description in question designated the land with a reasonable degree of certainty will hardly be called an arbitrary one. To call it this would be to accuse Congress itself of arbitrary action. The act of July 1, 1898, provides in terms that "all selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made." (30 Stat. 620.) The possibility of identifying lands according to the description by which they will be known when surveyed is here distinctly recognized; and surely no court can say that that description is under one law so inadequate as to be arbitrary, which under another law was recognized by Congress itself as being so appropriate that it was specially required.

Nor is it difficult for anyone, acquainted as this Court is with the legislation affecting public lands in the Western states, to understand why that form of selection should have been specified and required. Speaking generally, it is, perhaps, the very best method of designating or describing unsurveyed lands that could be devised. Situations may, of course, be imagined where lands are so remote from any public survey that this form of designation would give little information as to the locality in which they lie. But in the present state of public surveys such situations are not numerous—certainly not along the lines of the land grant railroads; and for many years settlements on unsurveyed lands within the boundaries of the grants to those railroads have been made with direct reference to the description by which they should be

known when surveyed. The grants to the railroad companies included all odd-numbered sections, *whether surveyed or unsurveyed,* which at date of definite location were free from any claims or other rights; and the settler knew when initiating a settlement that if the land settled upon proved to be an odd-numbered section, he must relinquish it to the railroad company. Knowing this, he has made his settlement with direct reference to the public survey.

As an illustration of the "certainty" of the form of the description used by the Railway Company, suppose that instead of selecting a quarter section by reference to a name by which it would be known when surveyed, the Railway Company had made its selection by a metes and bounds description, tied in to a point of commencement on the nearest line of survey. This would have been just as easy, and just as practicable, for the Railway Company to do, at the time of selection—had it been required. But it was *not* required—it was not even permitted by the Departmental regulations. Such a description would have been not merely "reasonably certain," it would have been mathematically certain. And no one would have assumed to assert that it did not conform to the requirement of certainty in the act of 1899—in fact that is just what counsel has hitherto contended the Railway Company should have done. Yet such a description would have meant no more, for any practical purpose, would have furnished no more definite or certain information, and would have made the land no easier to identify, than the description which was prescribed by the Department and used in the selection list. Every difficulty which the Court of Appeals imagines an intending settler would encounter in an attempt

to identify land described as in the selection list, would be encountered equally if the description were by metes and bounds as illustrated. And in the Daniels case, the Department has pointed out the reasons why a description in terms of the survey to be made is more satisfactory, from an administrative standpoint, at least. Furthermore, the Department, the District Court, the Court of Appeals and this Court (in the West case) have pointed out that the description actually used and the metes and bounds description suggested, are the exact equivalents of each other—except from the standpoint of practical convenience, which favors the form actually prescribed and used.

6.

But there is another, and quite independent reason, why the selection must be sustained, regardless of the view which the courts may now take as to the wisdom, propriety or correctness of the rulings and regulations of the Department prescribing the form of description now under attack.

It is a well settled rule of law that where a party has proceeded, in the acquisition of rights under the public land laws, in the manner prescribed by the Department with respect to matters of practice and procedure, his rights are not to be defeated upon the ground that the practice thus established was rooted in an incorrect construction of the law or in unsound views of administrative policy. It has been shown that the selection attacked in

this case was made in exact compliance with the practice established by the Department shortly after the passage of the act of 1899, and steadfastly maintained and upheld by it without change for many years thereafter; and rights founded thereon cannot now be destroyed because it is conceived that the practice was wrong, even though this Court should be of the opinion that the act was not rightly construed by the Department in the first instance.

The principle upon which this proposition rests has been established by numerous decisions of the Department and the courts; and is one of fundamental equity and justice. It recognizes that where the question is one of substantive law—where it is a question whether the land is subject to the particular form of appropriation, or whether the claimant is of the class entitled to take such land—the departmental construction of the statute is not necessarily binding upon the courts. But where the question is one of *practice and procedure merely*, and where the claimant has, in compliance with the rulings of the Department, taken the particular steps required by departmental regulations, in the manner prescribed by the Department under its construction of the act, he is not to be deprived of his rights upon the ground that such construction was ill-advised and that a different mode of procedure should have been prescribed. This principle rests upon the just and wise basis that a claimant, on whom the statute has conferred the right to acquire title to particular land, ought not to be penalized for his obedience to the rules laid down by the officers to whom the administration of the law is confided.

Turning first to the decisions of the Department, we find numerous cases in which the precise question was directly

considered. The leading case appears to be *Mary R. Leonard*, 9 L. D. 189. In that case a timber-culture claimant had made proof of entry and cultivation in compliance with the practice in force at the time of the entry; but by a decision subsequently rendered it was held that this practice was based upon an erroneous construction of the timber-culture law. The Department nevertheless held that the entryman was protected by compliance with the previous practice, even though erroneous, and Secretary Noble said:

> "Under the latter, which it is not denied by the counsel for the petitioner, is the correct construction of the law, the proof was insufficient. It is contended that inasmuch as the proof was in accordance with the law as construed when it was offered and accepted, that the subsequent change of construction should not be held to operate retroactively so as to invalidate it. In the case of *Miner v. Mariott*, 2 L. D., 709, it is said by this Department, that though 'a construction is clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation.' • • • In its practical administration, the law must be held to be what for the time being it is construed to be by the tribunals lawfully constituted for that purpose. This course is not only dictated by the necessity of the case, but is in accordance with reason and justice. To give a retroactive effect to a change of construction by a court or other tribunal, so as to render illegal acts which have been performed with trouble and expense in accordance with and on the faith of the former construction would seem to be as 'unjust as to hold that rights acquired under a statute may be lost by its repeal.'"

Miner v. Mariott, 2 L. D., 709, cited in the *Leonard* case, is another leading authority. In that case it was held that a previous practice of the Department with respect to the time within which an adverse claim might be filed, was erroneous, being founded upon a wrong construction of the statute. But the Secretary held that the claimant was protected by his compliance with the practice previously sanctioned, saying:

> "The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. *Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal.*"

In *Henry W. Fuss*, 5 L. D., 167, cited in the *Leonard* case, assignments of desert-land entries made while a rule allowing the same was in force were recognized, notwithstanding that rule was founded upon what was afterwards held to be an erroneous interpretation of the statute. Secretary (afterwards Mr. Justice) Lamar said:

> "Although it is silent on this question, I think a reasonable construction of the act as a whole, its purpose and intent being considered, warrants the rule against assignment; but being a matter of construction, or more correctly speaking of administrative policy, and a question which has been involved in some doubt, as would appear from the fact that the rule has been changed, *the regulation of your office which recognized the right of assignment had, until revoked, or overruled, the force and effect of law, so*

that rights acquired and valid thereunder should be protected."

In *Cudney v. Flannery*, 1 L. D., 165, Secretary Teller said:

"The regulations and rules of your office and of this Department in force at the date of Flannery's entry have the force of law as respected a tract subject to entry. There was then no objection to such an entry, and Flannery's was allowed as legal and made in accordance with what was considered a correct interpretation of the statute. *He thereby acquired rights which cannot now legally or equitably be repudiated* * * * *even though such an entry might not now be allowed. The latter rulings cannot have this retroactive effect.*"

In *David B. Dole*, 3 L. D., 214, Secretary Teller said:

"I think it immaterial that the construction was erroneous and unwarranted, so long as it was the official announcement of the law by the Land Department. * * * I do not understand that a party acts under a misapprehension of the law, so as to lose any right, when he acts under its official interpretation. The misapprehension in such a case is upon the part of the interpreting authority, and not upon him who in the prosecution of a claim conforms to such interpretation. A different rule would permit every person to construe the law for himself; and hence, your office being a proper exponent of this law, entrymen and their assignees acting under such exposition should not be required to forfeit any right by subsequent construction inconsistent with the first."

*

The instructions of July 16, 1889, 9 L. D., 86, contain the following language:

"But if the entry was made under rulings of the Department in force when the application was made, that ruling should be allowed to stand and control the case. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal. * * * It seems to me that, inasmuch as the Department from the time of the passage of the bill up to the circular of the date *of* June 27, 1887, erroneously construed the true spirit and intent of the act, and in pursuance thereof numerous entries have been made under the law as thus promulgated, amounting to some 2,500 or more, that such entries should be protected under the construction thus given the act, giving such construction all the force and effect of law. Were it not so, great wrong and inconvenience would result. In this character of entries it has been repeatedly held that, if the entry is made under rulings of this Department in force when the application is made, it should be allowed to stand. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal."

In *C. P. Masterson*, on review, 7 L. D., 577, it was said:

"It is evident that such action was not inadvertence, but an erroneous construction of the law. The entry in the present case was allowed under the practice then prevailing in your office. It has been held by the Department that where a decision operates to change a practice or rule well established, especially if it be upon a point of interpretation not without difficulty, the action already taken by private parties in good faith under the prevailing practice may be sustained in proper cases; and although such construction may have been erroneous, it does not follow that any acts which have been performed in pursuance of or in accordance with such construction or interpretation, are necessarily illegal."

The same doctrine has been applied, in varying language and under various sets of circumstances, in a great number of departmental decisions, among which are the following:

Milne v. Ellsworth, 3 L. D., 213.

Isham Floyd, 5 L. D., 531.

James Spencer, 6 L. D., 217.

Candido v. Fargo, 7 L. D., 75.

C. P. Masterson, on review, 7 L. D., 577.

William Thompson, 8 L. D., 104.

John M. Lindback, 9 L. D., 284.

J. H. Koppernal, 10 L. D., 93.

Jacob Oswald, 11 L. D., 155.

Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D., 391.

Ore Placer Claim, 11 L. D., 457.

Edwin F. Frost, 21 L. D., 38.

Tustin v. Adams, 22 L. D., 266, 270.

Ella I. Dickey, 22 L. D., 351.

State of California, 22 L. D., 428.

Kirk v. Brooks, 24 L. D., 448.

Labathe v. Roberds, 25 L. D., 207.

Rough Rider and Other Lode Claims, 42 L. D., 584.

In Germania Iron Co. v. James (C. C. A. 8th Circuit), 89 Fed. 811, Judge Sanborn said:

> "The reasonable and established rules and practice of judicial tribunals become as much a part of the law of the land as the statutes under which they act. • • • Moreover, the rule and practice here under consideration stand upon far higher ground than the ordinary rules for the mere conduct of proceedings in courts. They condition the inception, the foundation,

the very existence, of all rights and title to this land. Rights initiated in accordance with them becomes vested interests in property, and attempts to establish rights in violation of them were as though they had not been. They had become an established rule of property, upon which men relied and had the right to rely. The maxim, 'Stare decisis, et non quieta novere,' applies nowhere more universally, or with more salutary effect, than to those rules and that practice under which property is acquired or secured. It is often far more important that these should be certain and changeless than that they should be right. * * * Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul rights acquired under this rule and practice, or to deprive Hartman of his title to this land, by a retroactive decision, made five years after his right to it had vested, to the effect that the established rule or practice when he made his entry was either inconvenient or erroneous. They might undoubtedly have made and promulgated a new rule which would have governed cases arising after a new rule of practice had been made and had become known, but Hartman and the other applicants * * * had the right to the determination of their claims according to the practice as it then existed. Retroactive decisions of judicial tribunals are as vicious and ineffectual as retroactive laws. * * * System, order, and the uniform application of the laws, the rules, and the practice to all litigants alike, are as essential to the administration of justice in the Land Department as in the courts."

On a second appeal in the same case (*James v. Germania Iron Co.*, 107 Fed. 597) the same learned judge said:

"The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by

> the laws of the land and the rules and practice of the Department on that day, and no subsequent rules, decisions, or practice could divest them of the property they then secured, or deprive them of their equitable or legal rights to the title to the land which they then acquired. * * * Even if the opinions cited against it had decided that the rule was abrogated or limited, they would have been nothing more than erroneous judgments. They could not have affected the rule. * * * Nothing short of an express and formal repeal or abrogation of the rule and public notice thereof by the Secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms. * * * Hartman had the right to rely upon this rule and practice, and to secure this land in accordance with it."

A great leading case on the subject is *United States v. MacDaniel,* 7 Pet. 1, 14. And we may say in passing that we have found no case in which the principle of the *MacDaniel* case has been questioned or its authority doubted. That case arose upon an attempt to recover from a clerk in the Navy Department special allowances paid him under a practice or usage in force in the Department, which was afterwards abrogated. There was no specific rule, regulation or decision sanctioning such payments—the matter was merely one of customary usage and practice in the Department. It was admitted that there was no statutory authority for such payments. This Court held the new ruling valid and effective as applied to subsequent transactions, but also held that although this new ruling might be based upon a true construction of the law, and might properly have been applied in the first instance, yet it could not be given a retroactive effect in derogation of

past transactions founded upon a construction theretofore given the law by the Department, as established by its previous usage and practice; and the judgment of the court denied recovery of the sums paid. In this connection it was said:

> "A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of any department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. * * * Hence, of necessity, usages have been established in every department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given it, *and must be considered binding on past transactions.*"

In *United States v. Newport News, etc., Co.*, 178 Fed. 194, the Court of Appeals of the Fourth Circuit applied the doctrine of the *MacDaniel* case to the construction of a contract between the Government and a shipbuilding company, holding the latter protected by customary practice in previous transactions. The court quoted from the *MacDaniel* case the language set forth above, and upon that authority held that the course of customary practice in previous transactions between the Government and its contractors must be deemed to have established a rule in the light of which the contract should be construed; so that a different requirement, although supported by the

terms of the contract itself, would be equivalent to a retroactive change in established usage which could not be made to the prejudice of rights already initiated, under the principle established by the *MacDaniel* case.

And as lately as *Haas v. Henkel*, 216 U. S. 462, 480, and *United States v. Birdsall*, 233 U. S. 223, 231, this court has quoted with approval the language of *United States v. MacDaniel*, to which reference has already been made.

In *State v. Kelsey*, 44 N. J. L., 1, 22, the New Jersey court quoted with approval the following language of the Supreme Court of Massachusetts in *Rogers v. Godwin*, 2 Mass. 477:

> "And although if it were now *res integra* it might be very difficult to maintain such construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long-continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

In *United States v. Hammers*, 221 U. S. 220, which involved the question of the assignability of desert land entries, this Court said:

> "We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land Department the weight to which in such case, the court acknowledged, they are entitled. * * * Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the *practice of*

> the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. *At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.*"

There is no room for distinction, with respect to the application of the principle declared in the authorities cited, between cases where the rule of practice or proceedure which was held to protect a claimant who had complied therewith, was a rule established by express regulation, circular or instruction, or a rule not founded upon express regulation or decision, but built up by custom, usage or practice. Many of the cases cited above are of the latter character. This is true of several of the most important of them, including *United States v. MacDaniel, supra.*

In *Haas v. Henkel*, 166 Fed. 621, 627, it was said:

> "Such regulations, as held in *United States v. MacDaniel*, 7 Pet. 14, need not be in the form of writing, but may consist of established usages and practices, which have become a kind of a common law of the Department."

And in the very recent case of *United States v. Birdsall*, 233 U. S. 223, 231, Mr. Justice Hughes said:

> "Nor was it necessary that the requirements should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. United States v. MacDaniel, 7 Pet. 1, 14."

Let us emphasize the fact that the question is not one having to do with substantive rights under the statute. It is not a question of who can take under the act, or of what land may be taken, or of the extent or character of the appropriation. It is merely a question of *procedure*—of what steps must be taken in order to perfect the right granted. The Department, construing the statute, pointed out the steps to be taken. The Railway Company followed the line thus marked out, faithfully and with exactness. The rights of the respondent Timber Company were acquired on the faith of the regularity of the Railway Company's procedure, in the light of the departmental sanction given it. No one was misled or prejudiced by the fact that the Railway Company pursued the approved practice instead of adopting a different method. The Railway Company could just as well and just as easily have taken another course, and would have done so if the Department had so directed. And it cannot be pretended that appellee's position would be any different or better if the Department had construed the act differently and had required a different course of procedure. Certainly he would not have been benefited if the selection list had described the land by metes and bounds, or in some other manner.

II.

We have indicated that there were two grounds of attack on the validity of the Railway Company's selection; the first based upon the alleged insufficiency of description contained in the selection list (which has already been dealt with), and the second based upon the supposed effect of an application for survey under the act of August 18, 1894 (28 Stat. 372, 394), made by the Governor of Idaho in July, 1901, a few days before the Railway Company's selection list was filed. The District Court sustained the selection against both grounds of attack; and in his able and exhaustive opinion Judge Dietrich gave most consideration to the second point. But the Court of Appeals went off on the point that the description was insufficient, and did not consider or touch upon at all the question involving the application for survey. However, we assume that this question is in the case, and will be urged by appellee in this court, as it was in the courts below.

Appellee's theory is that the application for survey became effective before the land was selected by the Railway Company, and the land was thereby placed in reservation, so that the selection by the Railway Company was void for all purposes and conferred no rights whatever upon the Company, although such reservation was not a barrier to subsequent settlement under the homestead law.

It will be apparent that the first question to be determined is whether there was a *valid* application for survey under the act of 1894, which became effective *before* selection of the land by the Railway Company on July 23, 1901. If this question can be resolved in appellee's favor,

it will then become necessary to determine whether such application for survey resulted in an absolute reservation or withdrawal of the land, so that no rights whatever attached under the Railway Company's selection, notwithstanding the fact that the State thereafter failed to make a valid selection of the land and could not and did not acquire any rights therein.

Both these questions have been determined adversely to appellee's theory by numerous decisions of the Land Department, as well as by the District Court in the case at bar. After some early vacillation the Department has consistently held, first, that the application for survey with which we are here concerned was invalid and never became effective; and second, that even a valid application for survey under the act of 1894 merely creates a preference right in favor of the State, and that a subsequent selection under an act like that of March 2, 1899, initiates a claim which is effective against all the world unless the State itself thereafter succeeds in appropriating the land under the provisions of its granting act—which it here failed to do. And appellee can prevail only if this Court holds the decisions of the Department and the District Court erroneous in law as to *both* these issues. If *either* was correctly decided her case falls.

1.

The facts with respect to the application for survey are somewhat complicated, and there are some inconsistencies in the earlier decisions of the Department which tend to confusion. It is therefore essential to a proper understanding of the case, not only that the facts be attentively

considered, but also that the chronological relation of the various steps taken be kept clearly in mind. And we believe that it will conduce to a better understanding of the situation if we preface our outline of the steps taken under the act of 1894 with a brief analysis of the act itself.

This act was passed in aid of land grants previously made by Congress to Idaho and other western states. An important feature of these granting acts was the so-called quantity and indemnity grants, requiring affirmative selection by the States; and this right of selection could only be exercised after survey. Complaint was made that the States were usually worsted in the race to the Land Office, and Congress thereupon passed the act of March 3, 1893, which gave a preference right of selection for sixty days after filing of the township plat of survey. This, however, was said to be insufficient, because it gave no protection against claims attaching before survey under laws permitting selection of unsurveyed lands and the initiation of homestead claims by settlement before survey; and the States demanded legislation under which some preference could be secured against such claims. In response to this demand Congress passed the act of 1894.

In construing that act its object and purpose must, under familiar rules, be kept always in mind. This was no more than to give the States a preference right of selection of designated unsurveyed lands, as against claims initiated after such designation is made. It was no part of the purpose of the act to discourage homestead settlements on unsurveyed lands, nor to limit or destroy the right of appropriation of such unsurveyed lands under other acts. Indeed, the act of March 2, 1899, with which we are here concerned, and the acts of June 4, 1897, and

July 1st, 1898, were all passed long after the act of August 18, 1894; and by each of those acts the selection of unsurveyed lands is expressly authorized.

So while it may be that by the literal terms of the act of 1894, the result of a valid application for survey is to "reserve" or "withdraw" the land designated in the application; nevertheless the true construction of the act, as settled by repeated decisions of the Land Department, is that the application for survey does *not* effect a "reservation" or "withdrawal" of the lands, in the sense in which those words are ordinarily used in land law terminology but merely secures to the State a preference right of selection. The land is not *segregated* by the application for survey (as it is by an ordinary entry or selection) so as to constitute a bar to the initiation of subsequent claims. Any claim thereafter initiated is, of course, subject to the preference right of the state, and will be defeated by a valid selection thereafter made by the State within the preference period. But if the State does not select the particular land, or if an attempted selection by the State is rejected as unauthorized or illegal (as in this case), the individual claimant is accorded priority over all other claims subsequently asserted. In one case, and one only,—the Departmental decision of March 20, 1911 (39 L. D. 583)—is a contrary view expressed. But that case stands alone and unsupported; it is inconsistent with all other prior and subsequent Departmental decisions on the subject (of which there are many) and it has since been expressly overruled and repudiated.

Another thing to be kept in mind in considering the provisions of the act of 1894, and the steps taken under it in the present instance, is the well-established rule that

the preference or privilege conferred by the act is in derogation of the common right to appropriate public land under other laws; and hence that it must be strictly construed and strict performance required of those steps upon which its operation is conditioned. See authorities hereinafter cited.

Now the terms of the act of 1894 require the following conditions to be performed in order that the State may acquire a preference:

(a) The Governor shall file with *the Commissioner of the General Land office* a written application for the survey of the designated township or townships.

(b) Published notice of such application, sufficient to "give notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State" for the prescribed period, shall be given by the Governor within thirty days after the date of the *filing of the application.*

(c) Such notice shall be published in a newspaper of general circulation in the vicinity of the lands designated, "which publication *shall be continued for thirty days from the first publication.*"

(d) The Commissioner of the General Land Office shall immediately give notice of the reservation of the designated township, or townships, to the local Land Office in the district in which the land is situated.

(e) The Commissioner shall immediately give notice of the application to the Surveyor General of the State, who shall thereupon cause the required survey to be made.

Notwithstanding some uncertainty in the earlier cases, it is now the settled law of the Department that strict compliance with these provisions is a condition precedent to the attaching of the preference right of the State; and also that the act contemplates, by necessary implication, the recognition and allowance of the application for survey by the Commissioner of the General Land Office, so that in the absence of such recognition and allowance the preference provisions of the act are inoperative.

In July, 1901, the Governor of Idaho undertook to apply under the act of August 18, 1894, for the survey of eighteen townships in northern Idaho, including township 43, range 4, with which we are here concerned. He signed a form of application which bore date July 5th, 1901, and which was addressed *to the Surveyor General for Idaho* and the Commissioner of the General Land Office. This paper was filed, not with the Commissioner of the General Land Office as required by the act of 1894, but in the office of the Surveyor General at Boise. It was so filed, not on the day of its date, but on July 8, 1901. On or shortly after July 10, 1901, it was transmitted by the Surveyor General, of his own initiative, to the Commissioner of the General Land Office, and was received in the General Land Office on July 15, 1901. It is now authoritatively settled that the application was not effective for any purpose until the date of its receipt by the Commissioner; and it is only by a stretch of construction favorable to the State (and consequently to the appellee) that it can be deemed to have been filed with the Commissioner, within the meaning of the act, on the latter date.

In assumed compliance with the provisions of the act of 1894 requiring published notice of the application for sur-

vey, the Governor issued a notice dated July 6, 1901,—two days before the delivery of the application to the Surveyor General and nine days before the date when the application was filed with the Commissioner and first became effective for any purpose. This notice, speaking from its date, declared that the Governor *had theretofore applied* under the act of 1894 for the survey of the townships named; and that those townships were reserved from other appropriation for a period to extend *from the time of such application* until the expiration of sixty days after the filing of the township plat of survey. As a matter of fact the Governor had *not* applied at the date of the notice, or at the time it was first published; and the notice was therefore false and misleading in a most essential particular. The authorities to which we shall refer demonstrate that it is fatal to a notice of this character if the date when the preference or reservation takes effect, as well as the period for which it runs, is incorrectly stated.

The notice was published in six weekly issues of an Idaho newspaper, commencing on July 10, 1901 and ending August 14, 1901. The act of 1894 provides that publication of the required notice shall commence "within thirty days *from* the filing of the application"; and that such publication "shall be continued for thirty days from the first publication." The word "from" as here used must be held synonymous with "after." As the notice was first published on July 10, five days *before* the filing of the application, that publication of the notice, at least, was ineffectual and must be disregarded. The construction most favorable to the State (and the appellee) is that the first publication made after the application was filed, viz.: the publication of July 17th, was the first effectual

publication of the notice. And as it was last published on August 14th, the requirement of the statute that the publication "shall continue for thirty days from the date of the first publication" was not complied with.

The application for survey embraced eighteen townships, containing more than 403,000 acres of land; and the State had theretofore applied for the survey of a large number of other townships throughout the State, which had not yet been surveyed and from which no selections had been made. At that time the quantity grants to the State were largely satisfied; and as this was long before the establishment of the principal forest reserves, and the great losses which the State afterwards claimed to have suffered through the inclusion of "school sections" within such reserves were then unknown and unforseen, a relatively small acreage was required to satisfy the State grants under conditions then existing. And the area of available lands in townships for the survey of which the State had theretofore made application, to say nothing of the townships named in the application of July 1901, was enormously in excess of any apparent requirements.

Passing upon the application for survey in the light of these facts, the Commissioner, on July 19, 1901, held that the application in question was excessive and improvident, and declined to recognize or allow it. Due notice of this action was given to representatives of the State, but no appeal from the decision was taken. It has since been established that the action of the Commissioner was within the authority vested in him by law; that his order was subject to appeal under the rules and practice of the Land Department, and if erroneous, could have been corrected on appeal; and that, whether erroneous or not, the order be-

came final and conclusive upon the lapse of the prescribed period without appeal.

The application for survey having been rejected by the Commissioner, no notice of such application was given to the local land officers and no notation or other record of the application or of any reservation of the townships named therein was entered upon the records of the local offices as required by the affirmative provisions of the act of 1894; nor was the notice of the application given by the Commissioner to the Surveyor General as required by that act. Neither was any action taken on behalf of the State to have the fact of the application or its claim of preference or reservation noted on the records of the local land offices. Therefore, when the Railway Company selected the land on July 23, 1901, and for many years thereafter, the records in the Coeur d'Alene Land Office (and the records of the General Land Office as well) contained no showing of this application or of the State's preference claim; but on the contrary it appeared from those records that the land was free from claim or appropriation and open to selection by the Railway Company.

In January, 1905, as a result of some subsequent efforts on the part of the State and a supplementary application for survey of the townships in question, followed by a deposit by the State to cover the cost of survey, the General Land Office was persuaded to accord a qualified recognition to the claim of the State as to certain of the townships embraced in the application of July, 1901. And on January 20, 1905, the Commissioner addressed a letter to the Register and Receiver of the Coeur d'Alene Land Office directing those officers to give notice by publication of the reservation of the specified townships

> "*from and after* * * * *January 18,1905, and for a period extending from January 18, 1905,* until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office * * * during which period the State authorities may select any of the lands situated in said townships, *which are not embraced in any adverse claim.*" (Tr. p 132.)

The first entry ever made in the Coeur d'Alene Land Office which in any way recognized, or was based upon, this application for survey, was the entry made in obedience to the Commissioner's letter of January 20, 1905. And that entry, by its express terms, indicated that the right of the State dated from January 18, 1905, and was subordinate to claims initiated prior to that date. It was at one time assumed, that this action gave the State a preference right dating from January 18, 1905; but subsequently, upon full consideration, the Department finally held (and this position has been consistently adhered to ever since) that the application for survey was ineffective for any purpose, and that the State acquired no preference right whatever thereunder.

On July 30, 1909, after the filing of the township plat of survey in the local land office, application was made in the name of the State of Idaho to select this and other land in the township, under the indemnity provisions of the State school land grants, in lieu of certain designated sections 16 and 36 alleged to have been lost to the State by reason of their inclusion in forest reserves. The proffered selections were rejected, and the rejection affirmed by the Secretary on appeal. It was held that the application for survey made by the State under the act of August 18,

1894, never became effective and that the State acquired no preference right thereunder. And it was further held that even should it be conceded that the State had a preference right of selection, nevertheless under the constition and laws of Idaho, as construed by the Supreme Court of that State, the representatives of the State were without authority to make selections in lieu of the bases tendered; that an act of the legislature of Idaho passed February 8, 1911, had no retroactive effect; and that the proffered applications to select were in and of themselves unauthorized and void.

It was also held that neither the application for survey, nor the attempt by the officers of the State to select the land in July, 1909, in any manner prejudiced or affected the validity of the Railway Company's selection of July 23, 1901; that that selection was in all respects regular and valid, and entitled the Company to the land; and that as Delany's settlement was made two years after selection by the Railway Company, he acquired no rights thereunder. As already stated, the State acquiesced in the decision and is out of the case.

2.

In disposing of this question the learned trial judge said (Tr. pages 138-145):

> "The defendant Railway Company filed its selection lists, under the exchange provision of the act of March 2, 1899, (30 Stat. 993), on July 23, 1901, about a year before settlement by any person. A few days prior to such selection, however, the State of Idaho had made application for the survey of a large body of land, including that in controversy, under the pro-

visions of the act of August 18, 1894, (28 Stat. 373, 394), and the question is, whether the proceedings taken by the State prior to July 23rd operated so far to withdraw the land from the public domain that it could not be selected by the Railroad Company either absolutely or conditionally. By the Land Department the question was answered in the negative, first, because there was no valid, effective application for survey before the Railroad Company filed its selection list, and, second, because, by the settled construction of the Department, lands, even though embraced in a valid application for survey by the State, may be selected by a Railroad Company subject to the State's preference right. Such preference right the State has here failed to assert, and no claim upon its part is presently involved.

"Under the act of 1894 it is provided that (a) the application for survey must be made by the Governor of the State to the 'Commissioner of the General Land Office,' (b) notice of the withdrawal or reservation of the land is to be immediately given by the Commissioner to the Surveyor General of the State, and to the district Land Office, and, (c), within thirty days from the filing of the application, the Governor of the State must give notice of the application by publication for thirty days in a local newspaper. The lands so to be surveyed 'shall be reserved, upon the filing of the application for survey, from any adverse appropriation, by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of filing the township plat' in the proper district Land Office.

"On July 8, 1901, the Governor of Idaho filed with the Surveyor General an application bearing date July 5th, for the survey of eighteen townships, includ-

ing township 43 North, Range 4 East, and by the Surveyor General the application was sent to the Commissioner of the General Land Office, by whom it was received July 15th. It is clear, I think, that the application did not become effective for any purpose until it reached the General Land Office, and such is the holding of the Land Department. A notice bearing date July 6th was published in six weekly issues of a local paper, the first publication being on July 10th, and the last on August 14th. Assuming that the first effective publication was that of July 17th, two days after the receipt of the application by the Commissioner, I am inclined to the view that sufficient notice was given to meet the requirements of the law; the publication was made in every issue of the paper published during the thirty-day period following the filing of the application.

"As already stated, the application was for the survey of eighteen townships, or approximately 403,060 acres, and other applications of a similar character were pending. Taking cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. *No appeal having been taken by the State from his ruling, the same become final and binding*, provided, of course that the Commissioner was acting within his jurisdiction. The application having been declined, *no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records*, of the reservation or withdrawal of the land. Such was the status of the application and of the Land Office records, when, upon July 23rd, the Railroad Company filed its selection lists. Later, in January, 1905, it seems that as a result of certain supplementary pro-

ceedings, the General Land Office recognized the preference right of the State, *but only from January 18, 1905, not from July 15th 1901*, as appears from a letter of date January 20, 1905, from the Commissioner to the Register and Receiver of the district Land Office, by which the latter officers were directed to give notice of the reservation of certain townships, including 43-4, 'from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office, * * * during which time the State authorities may select any of the lands situated in said township, which are not embraced in any adverse claim.'

"Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions however, being in support of such jurisdiction. *N. P. R. R. Co. v. Idaho*, 39 L. D. 583; *Thorpe v. Idaho*, 43 L. D. 168; *State v. Roberson*, 44 L. D. 448. (Also the decision here involved.)

"The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a State with an unsatisfied grant of a thousand acres could, by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the State. Is it possible that Congress contemplated or intended such a result? By the terms of the act, the application for survey must be made only 'with a view to satisfying the public land grants * * * to the extent of the full quantity

of the land called for' by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the State? I am not suggesting that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the State has the right to select. Such being the extent of the right or privilege conferred upon the State, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect.

"It is further contended by the plaintiff that, defective though it may have been, the application served to withdraw the land from the operation of the act of 1899, reference being had to the familiar principle that the segregative effect of an entry or other selection is not necessarily dependent upon its inherent validity. *Holt v. Murphy*, 207 U. S. 407; *McMichael v. Murphy*, 197 U. S. 304; *Hodges v. Colcord*, 193 U. S. 192; *Sturr v. Beck*, 133 U. S. 541; *Edith G. Halley*, 40 L. D. 393. If, however, as is held, the Com-

missioner of the General Land Office had the power to reject it, *the application never became operative for any purpose. To have segregative effect, an invalid application or entry must in some way be accepted or recognized by the Land Department;* having been allowed, even though erroneously, it is binding upon and segregates the land. *But here at the very outset there was a declination to recognize the application.* If, however, we assume that the application was valid, and that the Commissioner was without power to reject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. *The land was not entered or selected; the State made no specified claim*, and it might ultimately decide not to select a single subdivision. True, the terms 'reserved' and 'withdrawn' are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select, at its option. *By the filing of the application the State initiated no claim or right to any portion of the land.* As has been very properly held by the Land Department, I think, the position of the State is closely analagous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. *Stewart v. Peterson*, 28 L. D. 515; *Croman v. West*, 34 L. D. 301; *State v. N. P. R. R. Co.*, 37 L. D. 70; *Swanson v. N. P. R. R. Co.*, 37 L. D. 74; *Delany v. N. P. R. R. Co.*, unreport-

ed, decision November 18, 1915). No good reason is apparent for holding such a practice illegal.

"Our attention is directed to the language of the act of March 2, 1899, creating and defining the limits of the right of the Railroad Company to select, wherein it is authorized 'to select, in exchange for lands relinquished by it, an equal quantity of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection,' etc. But this language does not alter the question. Neither can a citizen rightfully settle upon or enter land unless it be public land, not reserved, and to which no private rights have attached or been initiated, etc. And yet the plaintiff asserts the right of her predecessor to settle upon and claim the land in controversy long after the state filed its application, and after the Railroad Company filed its selection. The right of the Railroad Company to select is quite as broad as the right of the citizen to 'homestead.' As already suggested, by its application for survey, the State initiated no claim to this land; it was merely given a certain length of time to determine whether it would make such claim, and while the term 'reserved' is used, plainly there is no reservation in the ordinary sense, as for some Governmental purpose. The moment the preferential period in favor of the State expires, the lands may be entered by any qualified person, the same as in the case of other public lands.

"In view of these considerations, it is thought that the Land Department acted upon a proper construction of the law, and accordingly the plaintiff's bill will have to be dismissed, and such will be the order."

The question at issue is so ably and exhaustively dealt with by the Court below, that we might well submit the

case upon his discussion of it, without further argument. But because of the importance of the question, it seems best to supplement the opinon with some of the reasoning and authorities which were submitted to the trial court and which, presumably, influenced the decision.

3.

Now, of course, if there was no valid application for survey, there was no "reservation" or "withdrawal" of the land, under any possible construction of the act of 1894. It is only upon the theory that the land was reserved or withdrawn as the result of an application for survey, effective before selection by the Railway Company on July 23, 1901, that the validity of that selection can be questioned. This is plain enough on principle and from the language of the act itself, but it is also settled by a long and unbroken line of departmental decisions. Whatever doubt or uncertainty may have for a time existed with respect to the construction and effect of some of the provisions of the act of 1894, there was never any doubt or uncertainty as to this proposition.

William E. Cullen, 32 L. D. 240.
McFarland v. State of Idaho, 32 L. D. 107.
Kay v. State of Montana, 34 L. D. 139.
State of Washington, 37 L. D. 2.
State of Idaho v. Northern Pacific, 42 L. D. 118.
Thorpe v. State of Idaho, 43 L. D. 168.

It is also well settled that the steps which the act requires to be taken on behalf of the State are conditions

precedent, and that strict compliance with such provisions is essential.

In the case of *William E. Cullen*, 32 L. D. 240, the Department said:

> "The law grants to the State a special privilege in derogation of the common right of others to appropriate the public domain under the general land laws, and must be strictly construed and the State held to strict compliance."

This principle has been reaffirmed and applied in a number of cases, including *State of Idaho v. Northern Pacific*, 42 L. D. 118, where the Secretary quoted the following language from the opinion of the late Justice Lurton, then Circuit Judge, in *Campbellville Lumber Co. v. Hubbert*, 112 Fed. 718, 724, (a decision in which Mr. Justice Day, then Circuit Judge, concurred):

> "An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and the validity of all acts done under the authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional. (Citing *Sutherland on Statutory Construction*, Sections 454 and 458 and other authorities.)"

In many of the cases cited above the question turned upon the sufficiency of the notice and publication required by the act of 1894; and in all those cases it is held that a

proper notice, and publication thereof in strict accordance with the terms of the statute, are absolutely essential. The learned trial judge was inclined to think that the publication of the notice involved in this case might be held sufficient, notwithstanding the irregularities pointed out; and he does not appear to have considered the defect in the notice itself. Of course, in the view which the Department and the District Court have taken of the matter (and which we ourselves take) it is quite immaterial whether the notice and publication were good or bad. And we shall spend no more time on the point, save to assert our confident belief that the notice and publication were fatally defective, and the application for survey ineffectual for this reason, even if it could be sustained as against other objections; submitting the question on the authorities cited above and those which follow:

Rondout v. First National Bank, 37 Ill. App. 296.
Metropolitan Bank v. Moorehead, 38 N. J. Eq. 493.
Early v. Doe, 16 How. 610.
State v. Tucker, 32 Mo. App. 620.
State v. Cherry County, 58 Neb. 734, 79 N. W. 825.
Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953.

4.

In the courts below appellee's counsel made no real attempt to uphold the validity of the application for survey. Their position appeared to be that as the validity of the application was for a time assumed by the Department, it was sufficient to defeat the Railway Company's selection,

notwithstanding the earlier rulings recognizing the application were erroneous in law and fact and have since been recalled and vacated. This is a question which will be discussed hereafter.

Little need be added to what the trial court has said respecting the application for survey. It is apparent, as the court below points out, that (aside from all other considerations) the action of the Department in rejecting and disallowing the application was sufficient to prevent the attaching of any rights thereunder, unless the Department was wholly without jurisdiction to pass upon and reject the application as improvident and excessive, in any conceivable state of facts. For if there was *jurisdiction*, the ruling of the Commissioner, involving (as it did) a determination of *fact*, and being acquiesced in by the State without appeal, was final. It is not for the court to say, at this time, whether the Commissioner was right in holding that the particular application was excessive in the light of the facts then before the Department. The only theory upon which that action could now be reviewed and overridden is that the act of 1894 gave the State an absolute right to tie up every acre in every unsurveyed township in the State, although a single quarter section would have been sufficient to satisfy completely its unfilled grants.

Confusion may result unless attentive consideration is given to the later decisions of the Department dealing with the question. For while it is now well settled that this particular application for survey was inoperative and ineffectual, and neither conferred any right on the state nor constituted an obstacle to claims initiated after it was made, nevertheless in some of the earlier decisions a con-

trary view was taken. The rulings in favor of the State in the earlier cases seem to have been due partly to failure to give due consideration to the facts surrounding the application for survey, and partly to an erroneous view of the functions and authority of the Commissioner in proceedings under the act of 1894. *See Thorpe v. State of Idaho*, 35 L. D. 640, 36 L. D. 479, 42 L. D. 15; *Williams v. State of Idaho*, 36 L. D. 20, and *Northern Pacific v. State of Idaho*, 39 L. D. 583. But on further consideration of the same cases, those decisions were recalled and revoked and it was expressly held that the application for survey never became effective, and that the State never acquired any preference right thereunder; much less that a reservation or withdrawal of the lands resulted. *Thorpe v. State of Idaho*, 43 L. D. 168. And this conclusion has consistently been followed in all subsequent decisions on the subject, some of which are cited below:

State of Idaho v. O'Donnell, 44 L. D. 345.

State of Idaho v. Roberson, 44 L. D. 448.

Northern Pacific v. State of Idaho, 45 L. D. 37.

McDonald v. Northern Pacific, Secretary's decision of October 30, 1914, unreported, Record, pp. 133-135.

Delany v. Northern Pacific, Secretary's decision of November 18, 1915 unreported, Record, pp. 119-121.

State of Idaho v. Northern Pacific, Commissioner's decision of July 16, 1914, unreported, Record, pp. 86-97.

And see: *State of Idaho v. Northern Pacific*, 42 L. D. 118.

It is to be borne in mind that the latest decision in the Thorpe case (43 L. D. 168) represents the final action of the Department in the very cases in which contrary views are found expressed—so that the earlier decisions reported under the title of *Thorpe v. State of Idaho* and *Williams v. State of Idaho* must be regarded as mere interlocutory rulings which were rejected on final hearing and which therefore have no value as precedents.

It may now be regarded as established, so far as the Department has power to settle such a question, that the 1901 application for survey was inoperative, at least against claims initiated before January, 1905, for three independently sufficient reasons:

(1) Because the application for survey was rejected and disallowed by the Commissioner, whose decision became final for want of appeal and could not afterwards be questioned, whether right or wrong;

(2) Because when the Commissioner was finally persuaded, in January, 1905, to accord a qualified recognition to the claim of the State, the reservation and preference right then allowed was expressly made to date from January 18, 1905, and it was so noted on the records of the Land Department and in the Coeur d'Alene Land Office, and the State acquiesced therein;

(3) Because of failure to make substantial compliance with the requirements of the act of 1894, which are made conditions precedent to the attaching of the privilege conferred by the act, including the very important requirement for notation on the records of the Local Land Office of the fact that an application for survey had been made and that the State

claimed a preference right thereunder—a provision essential for the protection of the public and intending claimants as well as for the information of the local land officers.

It should be remembered that at the time the Railway Company filed its selection list on July 23, 1901, eight days after the application for survey was filed with the Commisioner of the General Land Office in Washington, that application had been rejected and disallowed by the Commissioner; the Company was without notice or knowledge that such an application had been made; the records of the Coeur d'Alene Land Office showed the land to be free from any sort of claim and open to selection by the Company (and did for three and a half years thereafter); the Company's selection was accepted and allowed by the local officers; and the representatives of the State had acquiesced in the rejection of the application for survey and for some years thereafter took no steps to assert or give notice of its alleged prior claim.

5.

Laying Departmental rulings out of sight for a moment, and looking at the question from a practical standpoint, and in the light of the language and intent of the statute, it is rather startling to consider how far the Court must travel to come to a decision overturning the patent in this case and awarding the land to appellee on the strength of Delany's rejected homestead application. It must be held that the attempted application for survey made by

the State under the act of 1894 was valid and operative, notwithstanding its disallowance by the Commissioner by an order from which no appeal was taken; notwithstanding the serious if not fatal, defects in the matter of notice and publication; notwithstanding the fact that no notation of the application for the State's claim of preference right thereunder was made upon the records of the Land Department or the local land office until 1905; notwithstanding the affirmative ruling in 1905 by which the period reserved for the exercise of the State's preference right was made to date "*from and after January 18, 1905*," and the acquiescence by the State in that ruling. And having sustained the application, it must be held further that by virtue thereof the lands were withdrawn and placed in reservation, so as to bar other forms of appropriation; although this is foreign to the purpose which the act was intended to serve; unnecessary to the protection of the privilege conferred upon the State; contrary to the established practice of the Department and a long line of Departmental decisions; and inconsistent with and subversive of the spirit and purposes of the general land laws. And this is a case where the State's attempted selection of the land was rightly rejected by the Department as unauthorized and void; where the State itself has acquiesced in that decision and makes no claim to the land; where the issue now rests between a party claiming under patent of the Government based upon a proper selection made on July 23, 1901, and a party claiming under an unsuccessful homestead application based upon an alleged settlement two years later; and where the settlement of the adverse claimant was just as much in conflict with the reservation

and withdrawal, if any such existed, as was the prior selection.

Suppose it were conceded that a valid application for survey would effect a reservation or withdrawal of the land and segregate it against other claims; and suppose it be also conceded that, as held in the earlier cases, it was beyond the power of the Commissioner to reject the application for survey to the prejudice of the rights of the State, and that there was a sufficient compliance with the requirements of the act of 1894 to secure to the State a preference right of selection. It is nevertheless a very different thing to hold, in a contest between individual claimants in which the State has no interest, that the lands were put in reservation and segregated against other appropriation by an application for survey which the Land Department rejected and refused to recognize, and of which no record was made in the local land office until years after selection by the Railway Company.

6.

Let us now consider, as a question of law, what the rights of appellee would be on the assumption that the application for survey should be held valid and operative. Appellee's present contention was disposed of by the Secretary of the Interior in his decision of November 18, 1915, (Tr. page 120) in the following language:

> "In his appeal Delany urged that the selection did not defeat his settlement because it was erroneously received and filed in the local office, and is inoperative, for the reason that an application had been made

by the State of Idaho prior to the date on which the list was filed, for the survey of the township in which the land is located under the act of August 18, 1894, and was pending at the time the (selection) list was filed, and, therefore, prevented the acceptance and filing of the list. This contention is contrary to the holding of this Department in the closely kindred case of *Swanson v. Northern Pacific Ry. Co.*, 37 L. D. 74. The decision in that case is in harmony with the established practice of the Land Department, which sanctions the receipt and filing of applications for lands while they are subject only to mere preferred rights and appropriations, (*Stewart v. Peterson*, 28 L. D. 515-519)."

Swanson v. Northern Pacific, 37 L. D. 74, cited by the Secretary in the Delany case, was decided about twelve years ago. In the Swanson case the precise point here at issue, arising upon facts precisely similar, was squarely presented to and decided by the Department. In that case, as in this, the Railway Company selected the land under the act of March 2, 1899, at a date subsequent to application for survey by the State, which was assumed to be valid. After selection by the Company, but prior to survey, Swanson made a homestead settlement, and on his behalf it was asserted that the application for survey made by the State under the act of 1894 operated to withdraw or reserve the land so as to prevent selection thereof by the Railway Company under the act of 1899. As Swanson remained in settlement on the land at the time of survey, and at the time when the State's preference right expired, his entry must have been allowed unless the Company's selection was held valid from its inception. The Department held the Company entitled to the land, saying:

"It is contended further that the application of the State of Idaho for a survey of the township of which the tracts applied for are a part, made prior to the selection by the Railway Company, operated to reserve the land from other disposition until after the expiration of three months from the filing of the approved plat of survey, and as his settlement was made and his homestead application presented prior to the expiration of said period, his entry should have been allowed. *The effect of the application of the State was not, however, to place the land in reservation, but only to secure to the State a preferred right to select the lands covered by its application. It did not operate to prevent the filing of other applications for the land subject to the superior right of the State.* In this case the State made no attempt to exercise its preferred right of selection, and there was therefore no bar to the consideration of other claims the same though such right had never existed."

Again, in *State of Idaho v. Northern Pacific*, 37 L. D. 70, the same question arose; and it was there said:

"It is contended that the Company was not entitled to select under the act of March 2, 1899, supra, * * * lands for the survey of which application was made by the State. * * * The objection that the lands were not subject to selection by the Company because embraced in the State's application for survey, even if well taken, could not be interposed as to the tracts applied for by Hooper. * * * As to Perkins, the objection, if valid, would only be material in so far as it relieved him from the necessity of proving his prior settlement. *The application of the State for survey did not, however, operate as an absolute withdrawal of the land described therein, but only subjected such lands to the preferred right of the State*

to select them within sixty days from the time of the filing of the approved plats of survey."

More recent cases in which this question has been considered and decided by the Department are *Northern Pacific v. State of Idaho*, 45 L. D. 37, and *Verdine R. Hall*, 45 L. D. 574. In both cases it is held (as it was held twelve years ago in the Swanson case) that the effect of the act of 1894 is merely to confer a preference right and that it does not place the land in reservation. These cases represent the last word of the Department on the subject; and because of this fact, and the line reasoning adopted, are precisely in point on the present question.

In the leading case of *Heirs of Irwin v. State of Idaho*, 38 L. D. 219, it was said:

> "In disposing of the State's claim it is sufficient to say that the question presented, or questions entirely similar, have been repeatedly determined by this Department and the courts. The preference right awarded the State by the act of 1894 seems to be in no way superior to the preference right awarded the successful contestant by the act of May 14, 1880, supra. * * * *The act of 1894 merely gives the State a preference right of selection* over all other applicants, and in thus inviting the State to apply for the survey of lands whereby a preference right over others may be secured, the Government in no way commits itself or agrees to withhold the lands from any disposition which it may find necessary to make of the same."

State of Utah, 33 L. D. 358, is another much cited case; and it was there said:

> "Waiving the question as to whether the record shows sufficient compliance with the act of 1894 on

the part of the State in the matter of the publication of notice, *it is clear that the only right intended to be granted the State was that of a preference over other intending claimants* under the public land laws, to make selections of such lands as it desired and needed, within the period of sixty days after the filing of the township plats of survey, and that under the State's application no such claim attached as prevented the appropriation of the lands by the United States under an act of Congress until formal selection thereof had been made by the State."

In the Attorney General's opinion of September 15, 1909, (38 L. D. 224), which was in part the basis for the decision in the Irwin case, full consideration was given to the doctrine previously declared by the Department that an application for survey under the act of 1894 does not result in the segregation or reservation of the land, but operates merely to give the State a preference right of selection; and the Attorney General concluded that this construction of the statute is not only reasonable, but plainly right; and that it should be consistently adhered to by the Department. In discussing the State of Utah case cited above, the Attorney General says:

"This decision was on the ground that the sole claim of the State * * * rested upon the application of the Governor for a survey of the land, whereas the only right intended to be conferred upon the State by the act of August 18, 1894, was simply one of preference over other intending claimants to the unsurveyed public lands."

In *Cronan v. West*, 34 L. D. 301, it was said:

"The preference right given by the act of March 3, 1893, is analagous to the preference right of a suc-

cessful contestant *and does not segregate the land against other applications;* and they are entitled to be received, subject to the State's right, and if that is not exercised, take effect from their presentation."

See also: *State of Idaho v. Northern Pacific,* 39 L. D. 343, and *Northern Pacific v. Mann,* 33 L. D. 621.

7.

It is a cardinal rule of statutory construction that the intent of Congress is to be sought, not merely in the bare words of its enactments, but also in the light of the evident aims and objects of the act considered; and that the interpretation to be placed upon terms used in the act shall be that which will carry out the purpose Congress sought to effect, without unnecessarily disturbing settled conditions and established rules of law and policy, the disturbance of which is really foreign to the purpose of the legislation and unnecessary to the full accomplishment of the object of the act. This is especially true where the contrary interpretation works out a result more or less inconsistent with the policy of other congressional enactments and with the public interest. In such a case the courts will not hesitate to restrict the broad language of a statute to a meaning which, while it carries out fully the manifest intent of Congress, does not go beyond the legislative purpose and work results which the law-making power evidently did not contemplate or desire.

"It is indispensable to a correct understanding of a statute to inquire first what is the subject of it; what

object is intended to be accomplished by it. When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of a narrower import may be expanded to embrace that intent. * * * *General words may be cut down when a certain application of them would antagonize a settled policy of the State.* * * * Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted, and qualified to carry out the intention of the legislature.' * * * The intention of an act will prevail over the literal sense of its terms. * * * The true meaning of any clause or provision is that which best accords with the subject and general purpose of the act."

Sutherland Stat. Constr. (1st Ed.), Secs. 218-219.

"The statute * * * must be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

Chief Justice Fuller, in *United States v. American Bell Telephone Co.*, 159 U. S. 548, 549.

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend

to cases which the legislature never designed to embrace in it."

Chief Justice Taney, in *Brewer v. Blougher*, 14 Pet. 197, 198.

"If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment."

Mr. Justice Davis, in *Heydenfeldt v. Daney Gold Min. Co.*, 93 U. S. 638; quoted with approval in *Hawaii v. Mankichi*, 190 U. S. 197, 213.

"But the subtle significance of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was its purpose to frustrate."

Chief Justice White, in *Rhoden v. Iowa*, 170 U. S. 412, 422.

"If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention."

Mr. Justice Davis, in *Reiche v. Smythe* 13 Wall. 162.

"It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

Mr. Justice Brewer, in Holy Trinity Church v. United States, 143 U. S. 457, 472.

It may be that the act of August 18, 1894, if read literally and without regard to the evident object of Congress and the general policy of legislation with respect to the public domain, might be thought to provide that the application for survey should operate to withdraw or reserve the lands absolutely from any appropriation before survey. But the mere words of the act cannot be considered apart from its plain intent and purpose. And this was not what Congress intended. The object of the act was to enable the State to secure for itself a preference right of selection. The State is not authorized to make selections before survey; and it was claimed that the most desirable lands were being taken up while still unsurveyed, so that when the time came at which the State might exercise its right to select in satisfaction of its land grants, the valuable lands would all be appropriated. Therefore Congress was induced to make provision which would permit the State, by taking the prescribed steps, to secure a first

right of selection which should be superior to claims initiated after those steps were taken.

In order that the object of the enactment may be fully attained, and the State given the fullest possible protection, it is only necessary to hold (as the Department has heretofore held) that compliance with the act gives to the State a preference right of selection superior to all claims initiated after the application for survey. It is not necessary for the protection of the State or to effectuate the objects of the enactment to hold that the application for survey operates to reserve, withdraw, or segregate the land, so as to bar the initiation of rights thereto subject to the superior claims of the State. Such a rule does not help the State at all, and has no tendency to accomplish the purpose of the act. If the State has a preference right of selection under the act, it has everything which can possibly benefit it. The view that the application for survey creates an absolute reservation of the land is in no respect to the advantage of the State as a proprietor, and is directly to its disadvantage from a governmental standpoint, since it tends to discourage settlement and development.

The mischiefs which Congress sought to remedy in the act of 1894, and the advantage which it was intended to give to the State, are so plain and obvious that it is hard to see where respectable ground can be found from which to argue for a construction of the act of 1894 different from that heretofore given it by the Department. And it ought not to be necessary to carry the discussion farther. But there is another reason against the view that the act effects an absolute reservation of the land which is worthy of consideration.

The policy of the Government for many years past has been to encourage settlement upon unsurveyed lands, and there has been much legislation for the protection of such settlers. There has also been considerable legislation providing for the selection or other appropriation of unsurveyed lands, the grant of the right to select unsurveyed lands being frequently held out as a consideration for relinquishments and exchanges which could not have been obtained had the sole inducement been the right to make selections after survey. Except where lands have been withdrawn before survey for a definite national use, as for Indian, military, or forest reservations, or for national parks, it has never been the policy of the Government to prohibit, limit, or discourage settlement on unsurveyed lands or the appropriation thereof under acts permitting the selection of such lands. Where withdrawals or reservations have been made, it has always been for some such definite purpose—and this is equally true of temporary withdrawals made pending the consideration of the question whether the lands should be permanently withdrawn.

At an earlier stage of the history of the public grants for internal improvements, great tracts of land were frequently withdrawn by the Department for the protection of the beneficiaries of railroad and other grants, in advance of the time when rights under the grants could attach to specific lands. At first these withdrawals were sustained by the lower courts, and were not prohibited by Congress—indeed, in some of the earlier cases the courts seemed to find express Congressional authority for such withdrawals. But this practice was long ago overthrown

and abandoned, and in their later decisions the courts have held that such withdrawals were unauthorized and void, although made by the Secretary under supposed authority of statute. In short, the withdrawal of large bodies of land in aid of the beneficiary entitled to a portion of the land so withdrawn, or entitled to make selections therefrom in satisfaction of a quantity grant, is a practice which has been condemned and abandoned; and if this act is open to such an interpretation, we think it is the only example of such legislation which can now be found.

8.

Let us concede for the moment that the language of the act of 1894 is fairly open to either construction—let us even concede that upon the face of the statute, and as a matter of first impression, the construction against which we argue is the one which the Department might now adopt if the question were before it for the first time. Nevertheless the statute has been construed otherwise by the Department; that construction has been applied in a number of decisions; large quantities of land have been disposed of in that view; vested rights have attached; and it is doubtless true that numerous settlements and other claims have been initiated on the faith of the rule declared in previous departmental decisions. In this situation it seems especially appropriate to refer to the well settled rule that where an act is in any degree doubtful or ambiguous, in language or intent, the construction placed upon

it in contemporary administration by the Department charged with the duty of executing it, is entitled to great weight; and where such construction has been recognized and applied over a series of years, it should be deemed conclusive—even though such construction may be of doubtful correctness when considered as an original proposition.

La Roque v. United States, 239 U. S. 62, 64.
Logan v. Davis, 233 U. S. 613, 627.
United States v. Hammers, 221 U. S. 220, 228.
Louisiana v. Garfield, 211 U. S. 70, 76.
Hewitt v. Schultz, 180 U. S. 139, 156, 163.
United States v. Alabama, etc., Railroad, 142 U. S. 615, 621.
Heath v. Wallace, 138 U. S. 573, 582.
United States v. Moore, 95 U. S. 760, 763.

9.

The distinction between a blanket application for survey under the act of 1894, and a specific claim to appropriate particular land by homestead settlement, entry, selection, or other form of appropriation under the public land laws, should be kept clearly in mind.

In the latter case a specific, positive and unqualified claim of right to appropriate the particular land is fastened upon the land by the initial steps prescribed by law. And it is settled law that when such a claim is recognized and allowed by the local officers in a preliminary way, and becomes a matter of record in the Land Department, the land is segregated from the public domain; and while the

entry or selection remains uncancelled and intact of record, the land is not subject to any other form of appropriation, and no rights can be acquired by subsequent settlement, selection or application to enter.

An application for survey under the act of August 18, 1894, has no such characteristic. It is, in form and substance, a mere blanket application to the Land Department for the *survey* of a designated township or townships. By virtue of the statute the effect of the application, if the conditions of the act are complied with, is to give the State a preference right to select, running for a specified period, which may be exercised or not at the pleasure of the State. It does not commit the State to the selection or acceptance of any particular land in the township, nor even to the selection of *any* land therein, in satisfaction of its grants. It does not amount to an assertion of right to any particular land, nor fasten a claim upon any tract.

It is for this reason that the Department has repeatedly held that application for survey under the act of 1894 is *not* a barrier to the initiation of a claim under public land laws, subject to the preference right of the State; and that it gives the State no right to the land as against a subsequent withdrawal for a forest reserve under a proclamation containing an excepting clause in favor of any entry, filing or "lawful claim"—although such exception is held to protect fully a homestead settlement, timber and stone or desert land entry, or lieu or indemnity selection.

It is true that if at the time the Railway Company selected the land in suit it had been subject to an existing claim, previously initiated, and then intact of record, it would not have been open to selection by the Railway

Company. But as the Department has repeatedly held, and as the trial court holds, a blanket application for survey (even if valid and effectual, as the application for survey now under consideration was not) accomplishes no such result. And the rule which has been established by the practice of the Land Department and the decisions of the courts, that the initiation of a specific claim to appropriate particular land, allowed in a preliminary way by the officers of the Land Department, and remaining intact of record, segregates the land against subsequent appropriation while the claim remains *sub judice* and undisposed of, has nothing to do with a case like this.

Again, as pointed out by the trial court, this rule applies only in cases where the prior application or entry has been *recognized or allowed*. "To have segregative effect an application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, is is binding upon and segregates the land." (Tr., page 143.) And the State's application for survey was never accepted, recognized or allowed, in any form, until January, 1905; and then, its recognition and allowance were expressly made to date from *January 18, 1905*; only. (Tr., page 141.) The earliest departmental decision in any way upholding the validity of the application was that of *Thorpe v. State of Idaho*, 35 L. D. 640 (afterwards recalled and vacated) which was decided *June 27, 1907*. The Railway Company's selection was made *July 23, 1901*, three and a half years before the former and nearly six years before the latter date.

We may concede that if the lands had been "reserved" or "withdrawn" prior to the filing of the Railway Com-

pany's selection list, this would have barred the selection, under the language of the act of March 2, 1899. But in the first place it has been settled, so far as Departmental construction can settle it, that even a valid application for survey recognized and allowed by the Land Department does not operate to "reserve" or "withdraw" the land within the meaning of the act of 1899. In the next place, if that construction of the statute be disregarded, it is perfectly obvious that only a *valid* application for survey, or at the very least an application recognized and allowed by the Department, could operate as a "reservation" or "withdrawal."

It seems unnecessary to argue that the application for survey is not a "claim or right" to the particular land, which "attached" or was "initiated" within the meaning of the act of March 2, 1899. The meaning of those words, as used in the public land law is too well settled by numerous decisions of this Court. And this definition was firmly established in public land law terminology long before the act of 1899 was passed. Such words apply only to a specific claim of right to appropriate particular land, fastened upon the land by the initial steps which the law requires for the appropriation thereof. They do *not* apply to a blanket reservation or withdrawal or the acquisition of a preference right under an act like that of August 18, 1894.

III.

The Railway Company's selection was made by filing a proper selection list in the local land office at Coeur d'Alene, in conformity to the provisions of the act of 1899 and the regulations and practice of the Department applicable to such cases. This selection list was duly accepted and allowed by the local officers, and the selection duly noted upon the records of that office. In accordance with the established practice the selection list was subsequently transmitted to the General Land Office at Washington and accepted there; although final action thereon was necessarily deferred until after survey. But the acceptance and allowance of the selection by the local officers was never reversed or set aside; and the selection has remained "intact of record" at all times since the day the selection list was filed.

Now in the last preceding subdivision we had occasion to refer to the rule that an entry or selection allowed by the local land officers, whether valid or not, *segregates* the land against every other form of appropriation under the public land law, until such entry or selection is regularly cancelled upon the records of the Land Department. While such entry remains intact of record and uncancelled, no rights can be initiated or secured by any subsequent settlement, entry, application or selection, notwithstanding such previous entry or selection is irregular or invalid—even though it be subsequently cancelled or rejected by the Department.

In the present case the Railway Company's selection was duly presented to and approved and allowed by the local officers (and subsequently by the Commissioner of

the General Land Office and the Secretary of the Interior), and that selection stood of record, intact and uncancelled, at the time Delany made his alleged settlement on the land and at all times thereafter, until the issuance of patent. Therefore, this selection constituted a complete barrier against the attempt of Delany to acquire the land; and he secured no right under his settlement and application to enter; and this without regard to how far the status of the land may have been affected by the application for survey. So Delany's claim was properly rejected by the Land Department, however erroneous its allowance of the Railway Company's selection may have been.

Holt v. Murphy, 207 U. S. 407.

McMichael v. Murphy, 197 U. S. 304.

Hodges v. Colcord, 193 U. S. 192.

Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357.

Sturr v. Beck, 133 U. S. 541, 548.

Whitney v. Taylor, 158 U. S. 85, 93.

Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 644.

Witherspoon v. Duncan, 4 Wall. 210, 218.

Neff v. United States, (C. C. A. 8th Cir.) 165 Fed. 273, 281.

Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811.

James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597.

Weyerhaeuser v. Hoyt, 219 U. S. 392.

And this is fatal to appellee's case. For it is familiar law that if error was committed by the Department in awarding patent to the Railway Company, it is not error of which Delany or his successor is entitled to complain. In cases like this it is not enough for the complainant to show error in awarding patent to his adversary; he must also show that if the law had been properly administered the patent would have been awarded to *him*. And if his application was rightly rejected, because the land was segregated against such claim as his at the time of his settlement and application to enter, a suit like this cannot be maintained.

Bohall v. Dilla, 114 U. S. 47, 51.
Sparks v. Pierce, 115 U. S. 408, 413.
Lee v. Johnson, 116 U. S. 48, 50.
Smelting Co. v. Kemp, 104 U. S. 636, 640, 647.
Leonard v. Lennox (C. C. A.) 181 Fed. 760, 762.

The cited cases demonstrate that the segregative effect of an entry or selection does not depend upon its inherent validity, but merely upon the fact that when presented it is recognized by the local officers and remains intact of record at the time a subsequent adverse claim is sought to be initiated. Whether valid or not it is a complete barrier against the attaching of any right by virtue of settlement, application, or otherwise, made while the prior entry or selection remains uncancelled of record. This is well explained in *Edith G. Halley*, 40 L. D. 393, where it is said:

> "In *McMichael v. Murphy*, (197 U. S. 304) the court held that a settlement on land already covered of record by another entry, valid upon its face, does not

> give such settler any right in the land, notwithstanding that the first entry might subsequently be relinquished or ascertained to be invalid by reason of facts dehors the record of such entry, and that the party first entering after the relinquishment or cancellation had priority over one attempting to enter prior to such relinquishment or cancellation. In that case, one who settled upon the land covered by a formal entry prior to its cancellation, was held to be inferior in right to the first applicant after the cancellation of the entry. In James v. Germania Iron Company, (C. C. C. A. 8th Cir. 89 Fed. 811, 107 Fed. 597) the court held that an entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled and removed."

And there is no distinction in this respect between an ordinary homestead or other entry, and an indemnity or lieu selection accepted by the local officers and entered of record in their office.

Weyerhaeuser v. Hoyt, 219 U. S. 392.

Southern Pacific Railroad Co., 32 L. D. 51, 53.

Santa Fe Pacific Railroad Co., 33 L. D. 161, 162.

Santa Fe Pacific Railroad Co. v. Northern Pacific Ry. Co., 37 L. D. 593, 596.

Santa Fe Pacific Railroad Co. v. California, 34 L. D. 12.

Santa Fe Pacific Railroad Co. v. Northern Pacific Ry. Co., 37 L. D. 669, 671.

Coffin v Moore (unreported), decided Jan. 10, 1911.

State of Idaho v. Northern Pacific Ry. Co., 42 L. D. 118, 123.

Eaton v. Northern Pacific Ry. Co., 33 L. D. 426.
Malone v. State of Montana, 41 L. D. 379.
Gallup v. Welch, 25 L. D. 3.
Hanson v. Roncson, 27 L. D. 382.
Northern Pacific Ry. Co. v. Wolfe, 28 L. D. 298.
Olson v. Hagemann, 29 L. D. 125.
Southern Pacific R. R. Co. v. California, 4 L. D. 437.
Southern Pacific Railroad Co. v. Cline, 10 L. D. 31.
George Schimmelpfenny, 15 L. D. 549.
St. Paul & Sioux City R. R. Co. v. Minnesota, 24 L. D. 364.
F. C. Fiakle, 33 L. D. 233.
California & Oregon Land Co., 33 L. D. 595.
Santa Fe Pacific Railroad Co., 34 L. D. 119.
Porter v. Landrum, 31 L. D. 352.
O'Shea v. Couch, 33 L. D. 295.
Heirs of George Liebes, 33 L. D. 460.
Minnesota v. Lewg, 25 L. D. 432.
Thomas v. Spence, 12 L. D. 639.

Some of the cases cited above involve railroad indemnity selections; some State school land indemnity selections; some State selections under general grants; and some lieu selections under acts like those of June 4, 1897, and March 2, 1899. But it is probably unnecessary for us to point out the precise similarity, so far as concerns the application of the rule, between those various classes of selections.

And in *Weyerhaeuser v. Hoyt*, *supra*, this Court quoted with express approval the language of Mr. Justice Van Devanter (then Assistant Attorney General) in *Southern Pacific Railroad Co.*, 32 L. D. 51, which runs as follows:

> "A railroad indemnity selection, presented in accordance with departmental regulations *and accepted or recognized by the local officers*, has been uniformly recognized by the Land Department as having *the same segregative effect as a homestead or other entry made under the general land laws.*"

A good exposition of the reasons why the segregation rule must be applied to unapproved selections as much as to homestead entries will be found in the two opinions in *Santa Fe Pacific v. Northern Pacific*, 37 L. D. 593 and 37 L. D. 609. And in *Coffin v Moore* (unreported, decided Jan. 10, 1911), it is said:

> "It is true that an indemnity selection presented by a railroad company is not effective against the United States until approved by the Secretary of the Interior; that the Secretary's approval is essential to the validity of any such selection, as the statute provides that indemnity selections must be made under his approval. At the same time, however, it is absolutely necessary to a proper administration of the land laws that there should be some rule respecting the segregative effect of a railroad company's indemnity selection until such times as it can receive proper consideration from the officers whose duty it is to dispose of the same. Having under consideration the necessity for, and effect of, rules of the land department, the Circuit Court of Appeals for the Eighth Circuit has held that it is essential to the impartial exercise of such power as exists in the land department that rules and regulations should be adopted and steadily maintained establishing a uniform practice and method of procedure; that the legislation of Congress was ample for the establishment of such rules, and when promulgated they become a law of property and cannot be ignored by the Department to the subver-

> sion of rights acquired under them; and, further, that an established rule of practice of the land department that after a decision by the Secretary has been made cancelling an entry of public lands, no subsequent entry of such lands can be made until a decision has been officially communicated to the local land officers and a notation of the cancellation made on their plats and records, is a proper, just and reasonable rule and is in accordance with the policy of Congress which makes the local offices the place for the initiation and establishment of all claims under its laws. *See Germania Iron Company v. James, et al.*, 89 Fed. Rep. 811."

There is some conflict of Departmental decision as to whether a selection of unsurveyed land has the same segregative effect that an entry or selection of surveyed land, has. But an examination of the authorities cited will demonstrate that the reason for the rule is the same in either class of cases. And in *St. Paul, Minneapolis and Manitoba Railway Co. v. Donohue*, 210 U. S. 21, 40, it was held that a mere settlement on unsurveyed lands was sufficient to work segregation thereof against subsequent claims; which is, of course, conclusive authority against the suggested distinction between surveyed and unsurveyed lands with respect to the segregative effect of a selection thereof.

As explained in many of the decisions cited above, and also in the opinion of the Court of Appeals in *U. S. v. C. M. & St. P. Ry. Co.*, 160 Fed. 818, the element upon which the segregative effect of an entry or selection depends is its *recognition* by the Land Department. As the Court says in the case last cited:

"The cases * * * all disclose an assertion of a right to certain land by claimants *which was recognized in some manner by the Land Department. We understand the crucial test of segregation is found in such recognition.* The right or claim, in order to constitute a segregation, must be such as in some manner, either by receipt of fees for entry, permission to file upon the land, noting the filing upon tract-books, submission to a commission under treaty obligation, or other like affirmative action of the Land Department, discloses a recognition of the claim, or discloses some privity between the claimant and the United States."

And it is uniformly held that the acceptance of an application to enter or select by the local land officers, the receipt of fees by them, or the notation of the entry or selection upon the records of their office, is enough to give it segregative effect; regardless of whether this action is recognized, sanctioned or approved by the Department or the General Land Office, and regardless of whether the entry or selection is ultimately held valid or invalid.

IV.

Much was said in the courts below of the duty of the courts to apply the strictest possible construction to the act of 1899, as against the Railway Company and its grantee. But in the first place the act of 1899 is not a grant as counsel seems to understand that term. It is thus described by the Department and the courts:

"It was deemed necessary to the accomplishment of its purpose that the United States should own the

land placed in reservation by the act (original land grant act). A voluntary conveyance by the Railway Company was the most feasible method of reacquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer. This is especially true where this amounts to a limitation upon the enjoyment of the right by the party as to whom the contract still remains executory. In the opinion of the Department every element of a contract is present in the act of March 2, 1899."

State of Idaho v. Northern Pacific Railway Co., 37 L. D. 135, 138.

West v. Edward Rutledge Timber Company, 210 Fed. 189, 199.

But even if the act of 1899 were subject to the same rules of construction as the original Northern Pacific grant, it does not follow that an especially strict construction should be applied. The rule in such cases is well stated in *Burke v. Southern Pacific Railroad Company*, 234 U. S. 669, 679, where Mr. Justice Van Devanter says of a grant similar to the Northern Pacific grant of 1864:

"We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. In-

stead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties *were brought into such contractual relations that the terms of the proposal became obligatory on both. Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, *it earned the right to the lands described.* Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant *should not be treated as a mere gift.*"

But the rule applied to railroad grant cases is really immaterial. For the act of 1899 contemplated an *exchange*, a bargain, in which the Government received *quid pro quo.* And the consideration to the Government passed to it, fully and completely, in July, 1899, and has been held and enjoyed by it ever since. The act should be construed as a *contract*, not as a donation grant, and as such its terms should be given a reasonable and liberal construction, such as will effectuate its purposes and se-

cure to the Railway Company and its successors in interest the rights conferred on them under the contract embodied in the act.

Respectfully submitted,

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NOTE: Attention is called to the memorandum of errors in the printed record, and to the index of exhibits, which appear on pages 168-171 of the Transcript of Record.